No. 261

In the Supreme Court of the United States

OCTOBER TERM, 1960

WARD LABORATORIES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 9) is reported at 276 F. 2d 952. The opinion and order of the Federal Trade Commission (Pet. App. 2a–47a)[1] have not yet been reported.

JURISDICTION

The decree of the court of appeals was entered on April 27, 1960 (Pet. 14–15). The petition for writ of certiorari was filed on July 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the printed appendix to petitioners' brief in the court below; "Resp. App." to the separate printed appendix of respondent in the court below.

QUESTION PRESENTED

The Commission found that petitioners had violated Section 12 of the Federal Trade Commission Act by advertising that the "common," or a "significant," cause of baldness is a germ infection yielding to petitioners' hair and scalp preparations. Concluding from the great weight of the evidence that at least 95% of baldness in fact is of the so-called "male pattern" type—the result of certain hereditary and endocrinal factors—for the treatment of which petitioners' preparations are valueless, the Commission ordered petitioners to cease and desist from advertising their products without disclosing that they will be effective only in cases of baldness other than the male pattern type, and that the great majority of all baldness cases fall within the later category.

The question presented is whether the Commission had the authority to require petitioners to make these affirmative disclosures in their advertisements.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act (38 Stat. 717; as amended by 52 Stat. 111, 114, 15 U.S.C. 52, 55) are set out in the petition for certiorari (pp. 3–4).

STATEMENT

Petitioners, three New York corporations and their two sole stockholders, are engaged in the business of selling and distributing in interstate commerce cosmetic and medicinal preparations designed for external use in the prevention of baldness, the growing of hair, and the elimination of certain scalp disorders

(Pet. App. 7a–8a). Petitioners advertise their products in literature of various kinds which is disseminated in commerce and by means of the United States mails (Pet. App. 4a). The Commission's complaint charged petitioners with false advertising in violation of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52, in representing that the common or a significant cause of baldness is a scalp infection, which petitioners' preparations will allegedly cure. At extensive hearings, four qualified medical witnesses (Resp. App. 10–36, 68–93) testified that male pattern baldness caused by heredity, age, and endocrine balance, accounted for 95% or more of all cases of baldness; that germ infection was not a cause of such baldness; and that petitioners' products would be useless in the treatment of such baldness. Two qualified medical witnesses testified on behalf of petitioners (Resp. App. 36–51, 58–68) that germ infection was a causative factor in common baldness and that petitioners' preparations would be of value in the treatment of such infection.

After consideration of all the testimony, the hearing examiner found that germ infection was not a significant cause of common baldness (Pet. App. 14a–41a) and that the advertisements in question, to the extent they represented that germ infection was the "common" or a "significant" cause of baldness (Pet. App. 13a–14a), were false and misleading. Finding that petitioners' advertisements were misleading both in failing to specify the type of condition their preparations would aid and in suggesting that this condition was a common one (Pet. App. 41a–42a), he proposed

an order forbidding petitioners to advertise their products without affirmatively disclosing that they would be effective only in cases other than male pattern baldness and that 95% of all cases of baldness fall within that category. The initial decision and proposed cease and desist order were adopted by the full Commission (Pet. App. 2a–3a). The court of appeals affirmed (Pet. 9).

ARGUMENT

1. Petitioners' principal contention is directed to the Commission's authority to order affirmative relief. This Court's decisions recognize, however, the Commission's broad discretion to formulate remedial relief. E.g., *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608, 613. Commission cease and desist orders providing affirmative relief have been affirmed in a number of cases. See, *e.g.*, *Wybrant System Products Corp.* v. *Federal Trade Commission*, 266 F. 2d 571 (C.A. 2), certiorari denied, 361 U.S. 883 (involving baldness remedies); *L. Heller & Son* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7); *Huskelite Manufacturing Corps.* v. *Federal Trade Commission*, 127 F. 2d 765 (C.A. 7). See *May Department Stores Company* v. *National Labor Relations Board*, 326 U.S. 376.

Alberty v. *Federal Trade Commission*, 182 F. 2d 36 (C.A.D.C.), is not in conflict. Here the Commission expressly made a finding as to the need for affirmative relief (Pet. App. 41a–42a) such as was found to be lacking in *Alberty*, and, as the court below observed,

"petitioners' own advertising requires the antidote because it definitely intends to, and does, give the impression that baldness is largely caused by something which their preparations can cure" (Pet. 13).

2. Other grounds advanced by petitioners to distinguish their case from other recent cases involving alleged baldness remedies in which this Court has denied certiorari[2] are similarly insubstantial. Thus, the courts have repeatedly sustained orders of the Commission, directed against misrepresentations of the therapeutic value of medicinal preparations, as supported by substantial evidence where the findings of misrepresentation were based upon the Commission's evaluation of conflicting testimony of medical experts. And no constitutional issue is involved in denying petitioners the privilege of using the mails or other interstate facilities to misrepresent the efficacy of their products. *E. F. Drew & Company* v. *Federal Trade Commission*, 235 F. 2d 735 (C.A. 2), certiorari denied, 352 U.S. 969; *American Medicinal Products* v. *Federal Trade Commission*, 136 F. 2d 426 (C.A. 9); *Shafe* v. *Federal Trade Commission*, 256 F. 2d 661 (C.A. 5); see *Donaldson* v. *Read Magazine*, 333 U.S. 178, 189–192; *United States* v. *Walsh*, 331 U.S. 432, 434.

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[2] See *Wyboant System Products Corp.* v. *Federal Trade Commission*, 266 F. 2d [illegible] (C.A. 2), certiorari denied, 361 U.S. 883; *Leo O. Johnson* v. *Federal Trade Commission*, 266 F. 2d 560 (C.A. 5), certiorari denied, 361 U.S. 914; *Erickson* v. *Federal Trade Commission*, 272 F. 2d 318 (C.A. 7), certiorari denied, 362 U.S. 940.

[3] *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461 (C.A. 9), certiorari denied, 361 U.S. 884; *Alberty* v. *Federal Trade Commission*, 118 F. 2d 669, 670 (C.A. 9), cer-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1960.

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tiorari denied, 314 U.S. 630; *J. E. Todd, Inc.* v. *Federal Trade Commission*, 145 F. 2d 858 (C.A.D.C.); *Irwin* v. *Federal Trade Commission*, 143 F. 2d 316, 323 (C.A. 8); *John J. Fulton Co.* v. *Federal Trade Commission*, 130 F. 2d 85, 86 (C.A. 9), certiorari denied, 317 U.S. 679; *Aronberg* v. *Federal Trade Commission*, 132 F. 2d 165, 170 (C.A. 7); *D.D.D. Corporation* v. *Federal Trade Commission*, 125 F. 2d 679, 680–682 (C.A. 7); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission*, 111 F. 2d 889, 891 (C.A. 7); *Neff* v. *Federal Trade Commission*, 117 F. 2d 495, 497 (C.A. 4); *Justin Haynes & Co.* v. *Federal Trade Commission*, 105 F. 2d 988, 989 (C.A. 2), certiorari denied, 308 U.S. 616. See also *Federal Trade Commission* v. *Raladam Company*, 283 U.S. 643, 646, in which as appears from the decision below (*Raladam Company* v. *Federal Trade Commission*, 42 F. 2d 430, 433–435 (C.A. 6)) there was substantial conflict in the evidence of medical experts. This was also true in *Federal Trade Commission* v. *Raladam Company*, 316 U.S. 149 (see 24 F.T.C. 475, 496).

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